HON'BLE SHRI G.S. SINGHVI, THE CHIEF JUSTICE

AND

HON'BLE SHRI JUSTICE G.V. SEETHAPATHY

WRIT APPEAL NO. 832 OF 2006

BETWEEN

M/s. Sree Durga Industries,
Rep. by its Managing Partner K. Nooka Raju,
Vijayawada.

.....

Appellant

And

The Commissioner,
Endowments Department,
Hyderabad & another

.....Respondents

Counsel for the Appellant : Shri D. Krishna Murthy

Counsel for Respondent No.1 : Government Pleader for Endowments

Dated: 09.08.2006

::JUDGMENT::

Per G.S. SINGHVI, CJ

This appeal is directed against order dated 27.06.2006

passed by the learned Single Judge in Writ Petition No.11113 of 2006 whereby he refused to entertain the appellant's challenge to order dated 09.05.2006 passed by Joint Commissioner and Executive Officer, Shri Durga Malleswara Swamy Varla Devasthanam, Vijayawada (respondent No.2) for cancellation of the contract awarded to the appellant for execution of gold malam work in first and second storeys of Vimana Gopuram.

The appellant is a registered partnership firm. It is also registered as a small scale industry for execution of metal works in the temples controlled by Endowments Department. It is said to have executed works in various temples in the State. In response to tender notification dated 15-4-2002 issued by respondent No.2, the appellant submitted tender for execution of the following works in Shri Durga Malleswara Swamy Varla Devasthanam, Vijayawada, Krishna District:

1) Gold Malam to third storey of Sri Ammavari Temple from Temple Sikharam to Pada Padmam (3rd storey),
2) Gold Malam to Sri Amma Vari Temple Vimana Gopuram (1 and 2nd storeys),
3) Gold Malam to 44 copper Kalasams on Sri Amma Vari Temple,
4) Gold Malam to the Kalasams on Sri Malleswara Swamy Temple and Sri Subrahmanyeswara Swamy Temple; and
5) Gold Malam to Copper Kalasams on 5 storeys Raja Gopuram in Ghat Road.

The tender of the appellant was accepted in respect of Item No.2 and it was awarded contract for a sum of Rs.55,13,187/-. Accordingly, agreement dated 26-6-2002 was signed between

the parties. On 16-6-2005, a T.V. Channel is said to have telecast a statement attributed to Sri K.V. Ramana, partner of the appellant that there was a theft of copper sheets of Vimana Gopuram of Sri Durga Malleswara Swami Varla Devasthanam, Vijayawada. Thereupon, the Executive Officer of the Devasthanam reported the matter to I Town Police Station, Vijayawada, which registered Crime No.132 of 2005 under Section 379 IPC. After investigation, the police found that the information given to the T.V. Channel was false. As a sequel to this, a complaint was lodged against Sri K.V.Ramana for committing offence under Section 182 read with 211 of the Indian Penal Code. The police registered the complaint as Crime No.167 of 2005. That case is said to be pending in the Court of I Additional Chief Metropolitan Magistrate, Vijayawada.

After registration of case against the partner of the appellant, respondent No.2 issued notice dated 8-3-2006 to the appellant proposing to terminate the contract on the ground that its partner had given false information to the reporter of the T.V. Channel and, thereby, damaged the reputation of Devasthanam and also hurt the feelings of the devotees and public at large. The representative of the appellant sent reply dated 17-3-2006 stating therein that during the pendency of the case before the Court, the management of the Devasthanam should not take action on the basis of the allegation contained in the complaint made to the police. After considering the reply, respondent No.2 passed order dated 9-5-2006 whereby he cancelled the contract.

The writ petition filed by the appellant questioning the legality of order dated 09.05.2006 was dismissed by the learned Single Judge by relying on the ratio of the judgment of the Supreme Court in **Kerala State Electricity Board v. Kurien E.**

Kalathil[1]. The learned Single Judge noted that the contract entered into between the appellant and respondent No.2 did not fall in the realm of public law and held that it was not a fit case for exercise of jurisdiction by the High Court under Article 226 of the Constitution of India.

Learned counsel for the appellant vehemently argued that the reason assigned by respondent No.2 for cancellation of the contract is wholly extraneous and the learned Single Judge gravely erred by refusing to entertain the appellant's challenge to order dated 09.05.2006. He relied on the judgment of the Supreme Court in **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.**[2] and argued that the High Court can interfere in contractual matters. Learned counsel then produced xerox copies of three papers, which include letter dated 25.07.2006 sent by Executive Officer, T.T. Devasthanams, Tirupati to Executive Officer, Shri Durga Malleswara Swamy Varla Devasthanam, Vijayawada, and estimate prepared for certain repair works in the temple by Shri S. Srinivasan, Contractor on 13.12.2005 and argued that the contents of these documents unequivocally prove that respondent No.2 cancelled the contract with an oblique motive of favouring another contractor namely Shri S. Srinivasan to whom the work has now been allotted by T.T. Devasthanams, Tirupati. Learned counsel submitted that the very act of obtaining estimates from Shri S. Srinivasan in advance shows that the officer concerned had pre-determined cancellation of the contract awarded to the appellant.

We have given serious thought to the arguments of the learned counsel, but have not felt impressed. It is trite to say that

in exercise of power under Article 226 of the Constitution, the High Court can interfere even in contractual matters to which State or its instrumentality or its agency or any public authority is a party and if the action of the State or its instrumentality/agency is found to be arbitrary or contrary to public interest, then the Court can annul the same, but it is equally well-settled that in such matters the Court will be extremely slow to interfere in such matters. In **State of U.P. v. Bridge & Roof Co.(India) Ltd.**[3], the Supreme Court was called upon to consider whether the rates quoted by the contractor were inclusive of the sales tax, if any, on the constructional plants, materials and supplies required for the purpose of execution of the contract. The respondent, who was awarded contract for rehabilitation and improvement of certain stretch of road in Uttar Pradesh applied to the Commissioner of Sales Tax, Uttar Pradesh for composition of tax liability. The Deputy Commissioner, Sales Tax, in exercise of the power delegated to him by the Commissioner, passed order dated 27-5-1992 that sales tax should be deducted at the rate of 1% at the time of payment of balance amount. After three years, the respondent filed writ petition in Allahabad High Court questioning the deduction of sales tax. The High Court did not go into the issue of maintainability of the writ petition, but disposed of the same by observing that the Government shall deduct only 1% of the bill in question up to 31-3-1995. While setting aside the High Court's order on merits, the Supreme Court held:

> "15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e., in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised

in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

17. Secondly, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of sub-clause (4) of clause 70 of the contract is again not a matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator or the civil court, as the case may be. If any amount is wrongly withheld by the Government, the remedy of the respondent is to raise a dispute as provided by the contract or to approach the civil court, as the case may be, according to law. Similarly if the Government says that any overpayment has been made to the respondent, its remedy also is the same.

18. Accordingly, it must be held that the writ petition

filed by the respondent for the issuance of a writ of mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law. (See the decision of this Court in **Asstt. Excise Commr. v. Issac Peter**[4] where the law on the subject has been discussed fully.) The writ petition ought to have been dismissed on this ground alone.

21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy — in this case, provided in the contract itself — is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 — whether for issuance of mandamus or any other writ, order or direction — was misconceived for the reasons mentioned supra."

In **Kerala State Electricity Board v. Kurien E.Kalathil**[5], the Supreme Court considered the issue relating to maintainability

of the writ petition in a contractual matter. The facts of that case were that the appellant, State Electricity Board executed an agreement dated 16-9-1981 with the respondent contractor for construction of a dam. After the commencement of the work, the State Government revised, by notification dated 30-3-1983, the minimum wages payable to employees employed in the works mentioned in the notification, w.e.f 1-4-1983. The respondent contractor claimed that he began making the revised payments to his workers as required for the period 1-4-1983. Till December 1984, the Board reimbursed the respondent contractor. However, from January 1985 the Board stopped making the payments for labour escalation, contending that construction of a dam was not covered by the notification dated
30-3-1983. This disagreement was settled when the Industrial Tribunal made an award on 14-10-1993, holding that the notification was applicable to dam construction (in case of workers employed for construction or maintenance of roads, or building operations and for stone-breaking or stone-crushing). The award became final. On 23-12-1994 the Board wrote the respondent demanding recovery with interest of Rs.3.65 crores, which had been paid in the form of advances for various heads of work. The respondent filed a writ petition seeking to have the letter of demand quashed and also praying for payment of the amounts paid in revised wages. While the petition was pending, the Board, by an order dated 26-2-1997 terminated the contract, which the contractor challenged by filing another petition. The High Court disposed of both petitions holding that the termination of the contract was arbitrary, unjust and not in public interest and directed the Board to pay the amounts claimed by the respondent

along with interest at 18%. The Supreme Court partly allowed the appeal of the Board and held:

> "The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not a writ petition under Article 226. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. .....A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies."

In **State of Jammu & Kashmir v. Ghulam Mohd. Dar**[6], the Supreme Court reiterated the settled rule that a writ of mandamus should not ordinarily be issued for enforcing the terms and conditions of a contract.

In the present case, we find that the appellant has neither pleaded in the writ petition nor any evidence has been produced before the Court to show that order dated 09.05.2006 was passed by respondent No.2 without complying with the rule of audi alteram partem. Rather, the factual matrix of the case clearly shows that order cancelling the contract was passed by respondent No.2 after giving notice and effective opportunity of hearing to the petitioner. Therefore, the learned Single Judge did not commit any error by refusing to annul order dated 09.05.2006 on the ground of violation of the rules of natural justice.

The argument of the learned counsel that exercise for cancellation of the contract was undertaken by respondent No.2 with an oblique motive appears attractive, but lacks merit and deserves to be rejected. In the affidavit filed by Sri Kosuri Nuka Raju, managing partner of the petitioner, there is no enumeration of the allegation of any personal ill-will or mala fides against the person holding the post of Executive Officer. It has also not been suggested that proceedings for cancellation of contract were initiated because the officer concerned wanted to favour someone else. Not only this, it was not even argued before the learned Single Judge that the cancellation of contract has been brought about with oblique motive. Therefore, at the appellate stage, we do not find any justification to entertain the new plea and record a finding that order dated 09.05.2006 passed by respondent No.2 is

tainted by mala fides and that too by ignoring the fact that the officer holding the post of Commissioner, Endowments and Executive Officer was not impleaded as party to the writ petition.

There is another reason for our disinclination to entertain the appellant's challenge to order dated 09.05.2006. For the reasons best known to it, the appellant has not produced copy of agreement dated 26.06.2002 to which reference has been made in paragraph 4 of the writ petition and pursuant to which the appellant started execution of the work of putting gold malam. At the hearing, learned counsel for the appellant tried to convince us that his client had not been furnished with the copy of agreement, but we are not prepared to believe this oral assertion because affidavit filed in support of the writ petition is conspicuously silent on this issue. In our considered view, by refraining to produce copy of agreement dated 26.06.2002, the appellant has deprived the Court of an opportunity to examine the terms and conditions of contract in a correct perspective and then determine whether it was a fit case for exercise of jurisdiction by the High Court under Article 226 of the Constitution of India and, therefore, we do not find any justification to entertain its challenge to the cancellation of contract.

We are further of the view that the discretion exercised by the learned Single Judge not to entertain the appellant's challenge to the cancellation of contract, does not suffer from any infirmity. Rather, it is in consonance with the series of decisions of the Supreme Court including **Kerala Electricity Board v. Kurien E. Kalathil** (supra).

In **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.** (supra), the Supreme Court reiterated the

well settled proposition that in exercise of power under Article 226 of the Constitution, the High Court can entertain writ petition and even decide disputed questions of fact. The facts of that case were that Rassik Woodworth Limited entered into a contract with M/s.RVO Kazpishepromysyrio, a State owned Corporation of Kazakhstan for supply of 3000 MT. of tea. The payment for such tea was to be made by the Kazak Corporation by barter of goods mentioned in the schedule to the agreement dated 26.08.1993. The Kazak Corporation assigned a part of the contract to ABL International Limited. On a direction issued by Reserve Bank of India to cover the risk arising out of the export of tea made by ABL International as per the contract, the latter approached Export Credit Guarantee Corporation of India Limited to ensure the risk of payment of consideration in the contract. On 30.09.1993, the respondent issued a comprehensive risk policy. On account of failure of Kazak Government to fulfill the guarantee given by it, ABL International lodged claim before the Export Credit Guarantee Corporation of India Limited. The latter contested the claim by saying that the ABL Corporation had changed the terms of contract without consulting it. After some correspondence, ABL International Limited filed writ petition in Calcutta High Court. The same was allowed by the learned Single Judge. On appeal, a Division Bench of that High Court reversed the order of the Single Bench and held that disputed questions of fact cannot be adjudicated by the High Court under Article 226. On further appeal, the Supreme Court referred to the earlier judgments in **K.N. Guruswamy v. State of Mysore**[7], **D.F.O. v. Ram Sanehi Singh**[8], **Ramana Dayaram Shetty v. International Airport**

Authority of India[9], **Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd.**[10], **LIC of India v. Escorts Ltd.**[11], **State of U.P. v. Bridge & Roof Co. (India) Ltd.**[12], and **State of Bihar v. Jain Plastics and Chemicals Ltd.**[13], followed some of them, distinguished the other judgments and laid down the following propositions:

1) While entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case has a discretion to entertain or not to entertain a writ petition. The High Courts have however imposed upon themselves certain restrictions in the exercise of this power. This plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless the impugned action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the High Court thinks it necessary to exercise the said jurisdiction.
2) Unless the action challenged in the writ petition pertains to the discharge of a public function or public duty by an authority, the courts will not entertain a writ petition which does not involve the performance of the said public function or public duty.

On merits, the Supreme Court held that Export Credit Guarantee Corporation of India Limited is an instrumentality of the State, inasmuch as, it discharges the functions of the government

and acts as an agent of the government and its action do have a touch of public function or discharge of a public duty and, therefore, it could not act arbitrarily in the matter of repudiation of contract.

In our considered view, the aforementioned judgment is clearly distinguishable. In that case, the Supreme Court granted relief to the appellant because on facts it was found that an instrumentality of the government in discharge of its public law obligation had acted arbitrarily. In the case before us, the contract entered into between the parties does not have anything to do with the public law obligation of the State or governmental function. It is a matter of plain and simple contract between the parties. The work relating to putting of gold malam has nothing to do with the sovereign functions of the State. Therefore, the learned Single Judge did not commit any error by refusing to quash order dated 09.05.2006 passed by respondent No.2.

In the result, the appeal is dismissed.

G.S. SINGHVI, CJ

G.V. SEETHAPATHY, J

09.08.2006
svs

[1] (2000) 6 SCC 293

[2] (2004) 3 SCC 553

[3] (1996) 6 SCC 22

[4] (1994) 4 SCC 104

[5] (2000) 6 SCC 293

[6] (2004) 12 SCC 327

[7] AIR 1954 SC 592

[8] (1973) 3 SCC 864

[9] (1979) 3 SCC 489

[10] (1983) 3 SCC 379

[11] (1986) 1 SCC 264

[12] (1996) 6 SCC 22

[13] (2002) 1 SCC 216